

NTSB Order No. EA-4521

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of January, 1997

Respondent.

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The Administrator has appealed from the oral initial decision issued by Administrative Law Judge Patrick G. Geraghty on May 8, 1996.¹ The law judge affirmed the Administrator's order suspending respondent's airline transport pilot, upon finding that respondent had violated 14 C.F.R. 91.119(a) and (c).

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and 91.13(a).² The law judge, however, reduced the Administrator's proposed suspension from 60 to 30 days. We deny the appeal.³

The Administrator's complaint and order charged that, on June 25, 1995, respondent, as pilot-in-command, operated an aircraft in one flight that included various low passes over houses and a picnic area. The law judge affirmed the factual allegations as to the low passes in the neighborhood of two identified houses (whose occupants testified), but did not find that the Administrator had met his burden of proof with respect to low flight over the picnic area.

The law judge concluded:

Board precedent is ample with respect to operations such as extant here. The period of suspensions have [sic]

²Sections 91.119(a) and (c) provide as pertinent that, in sparsely populated areas, and except when taking off or landing, a person may not operate an aircraft closer than 500 feet to any person, vessel, vehicle or structure and may not operate an aircraft at an altitude at which, if a power unit had failed, an emergency landing could not have been executed without undue hazard to persons or property on the ground. Section 91.13(a) prohibits operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³We have denied, by letter, respondent's late request for permission to late-file his appeal brief. Good cause to grant the request was not shown. See Administrator v. Hooper, NTSB Order No. EA-2781 (1988). The Administrator has also argued that respondent's reply brief is 1 day late, but does not urge that it be stricken.

The standard for considering a late reply is different from the standard applicable to appeal briefs and notices. See Application of George O. Grant, NTSB Order No. EA-3919 (1993) (late filed answer accepted on grounds that acceptance would not prejudice other party). See also Administrator v. Smith, NTSB Order No. EA-4088 (1994) (reply brief accepted on these grounds). Respondent's late reply brief is accepted.

run anywhere from 30 days up, depending on the egregiousness of the offense. The Complainant has sought a suspension of 60 days predicated, one would have to hold, on the basis of the entire complaint being affirmed, since that is what the Complainant sought. Complainant has failed in its proof on at least half of their [sic] case. The operation, two passes over the houses, leads me to believe that as a minimal suspension a period of 30 days would be adequate....

Tr. at 225. The Administrator, on appeal, charges that the law judge erred in finding he did not meet his burden of proof regarding the picnic area passes, and that precedent supports the sought 60-day suspension.

Despite the Administrator's exhaustive recitation and review of the evidence, we can find no basis to overturn the law judge's finding regarding the picnic area allegations. The law judge carefully reviewed the evidence, and correctly noted that the testimony was diametrically opposed. The issue was one of credibility, and we cannot find the law judge's conclusion to be unreasonable. Thus, the Administrator has not made the showing necessary for us to overturn the law judge's finding in this regard. See Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge).

The Administrator also argues that the law judge's sanction reduction does not accord with precedent. We disagree. Low flight cases typically result in sanctions ranging from 30 to 180 days, depending on the circumstances. In his appeal, the Administrator cites cases which, in our view, involve different, often substantially different, fact patterns. Administrator v.

Todd, NTSB Order No. EA-4320 (1995), bears no relation to the facts here. Indeed, in Administrator v. Paradowski, NTSB Order No. EA-3962 (1993), cited by the Administrator, the Board acknowledged that the 120-day sanction was high under the circumstances. Administrator v. Flowers, NTSB Order No. EA-3840 (1993), also cited by the Administrator, involved two incidents on two different days, and the amount of the sanction (90 days) was not specifically appealed or discussed.

In contrast, Administrator v. Hodgkinson, NTSB Order No. EA-3841 (1993), which involved the same violations as established here, resulted in a 30-day suspension for two incidents on two different days. In Administrator v. Finnell, NTSB Order No. EA-4217 (1994), a proposed 150-day suspension was reduced to 30 days, on proof of one flight involving the same violations as here. In Administrator v. Oeming, NTSB Order No. EA-3542 (1992), a low helicopter flight over downtown Atlanta resulted in a suspension of 20 days. Perhaps most similar to this incident is Administrator v. Michelson, 3 NTSB 3111 (1980), cited by the Administrator in closing argument, where the respondent received a 30-day suspension.

The foregoing discussion should demonstrate that the law judge's sanction reduction is not inconsistent with precedent. We will not disturb it.⁴

⁴Further, we do not believe the Administrator's argument would be stronger had he prevailed in his appeal to reinstate the low flight over the picnic area charge. Although more than one pass was involved, respondent's actions constituted one incident, (continued...)

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The 30-day suspension of respondent's airman certificate shall begin 30 days from the service of this order.⁵

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

(...continued)

on one day and during the same flight, and would not in our view be so cumulative as to warrant a substantially greater sanction.

⁵For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).